

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 206

Docket No. NY-1221-09-0226-W-1

**Richard A. Becker,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

October 15, 2009

Richard A. Becker, Coram, New York, pro se.

Aaron J. Fields, Esquire, Brooklyn, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal for lack of Board jurisdiction. For the reasons set forth below, we DENY the petition for failing to meet the criteria for review set forth under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on our own motion pursuant to [5 C.F.R. § 1201.118](#), AFFIRM the initial decision insofar as it concluded the Board lacked jurisdiction over a direct appeal of the appellant's non-selection for a promotion, VACATE the initial decision insofar as it found the appellant's individual right of action (IRA) appeal was prematurely filed, and REMAND the IRA appeal to the regional office for further adjudication consistent with the Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency did not select him for the GS-6 position of Administrative Support Assistant in retaliation for his whistleblowing activity. Initial Appeal File (IAF), Tab 1. During proceedings before the administrative judge, the appellant stated that he had filed a complaint with the Office of Special Counsel (OSC) dated April 21, 2009. IAF, Tab 6.

¶3 The administrative judge found that the appellant could not directly appeal his non-selection to the Board. IAF, Tab 9 (Initial Decision (ID)) at 2. She also found that, although the Board could consider an appeal of a non-selection as an IRA appeal based on an allegation that the agency's action constituted retaliation for whistleblowing, as of July 2, 2009, the date that she issued the initial decision, 120 days had not elapsed since the appellant stated that he filed his complaint with OSC and, thus, the Board could not assert jurisdiction over the IRA appeal. ID at 2-3.

¶4 The appellant petitions for review. Petition for Review File (RF), Tab 1. The agency responds in opposition to the petition. RF, Tab 3.

ANALYSIS

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. *Covington v. Department of the Army*, [85 M.S.P.R. 612](#), ¶ 9 (2000). It is well-settled that the Board lacks direct jurisdiction under [5 U.S.C. § 7512](#) over an employee's non-selection for a position. *See Gryder v. Department of Transportation*, [100 M.S.P.R. 564](#), ¶ 9 (2005). Thus, the appellant has not established sufficient grounds for disturbing the administrative judge's findings on this issue.

¶6 Despite the general lack of Board jurisdiction over a non-selection, an appellant may appeal his non-selection for a promotion by other statutory means, such as through an IRA appeal under the Whistleblower Protection Act. *See Becker v. Department of Veterans Affairs*, [107 M.S.P.R. 327](#), ¶ 5 (2007). An individual who files a complaint with OSC alleging retaliation for whistleblowing may file an IRA appeal with the Board upon receiving notice from OSC that it has terminated its investigation, or upon the expiration of 120 days after the complaint was filed if OSC has not notified the individual that it will seek corrective action on his behalf. [5 U.S.C. § 1214\(a\)\(3\)](#); *Kochanoff v. Department of the Treasury*, [98 M.S.P.R. 405](#), ¶ 6 (2005). An IRA appeal filed with the Board without notice that OSC terminated its investigation, or before the 120-day period has elapsed, will be dismissed for lack of jurisdiction. *Id.*

¶7 It is undisputed that, as of the date the initial decision was issued, 120 days had not elapsed since the appellant stated that he filed his OSC complaint, and he has not alleged that he has been notified that OSC had terminated its investigation into his allegations; thus, the administrative judge appropriately found that the Board lacked jurisdiction over the appellant's potential IRA appeal. *See* ID at 3. It is the Board's practice, however, to adjudicate an appeal that was premature when it was filed but becomes ripe while pending with the Board. *Kochanoff*, [98 M.S.P.R. 405](#), ¶ 7; *see Becker*, [107 M.S.P.R. 327](#), ¶¶ 7-8. We find it appropriate to remand the matter to the regional office for further adjudication of the appellant's IRA appeal. The agency has not contested the appellant's statement that he filed his OSC complaint on April 21, 2009. IAF, Tab 6. Thus, the appellant exhausted his administrative remedies on August 19, 2009, 120 days after he states that he filed his OSC complaint. *See* [5 U.S.C. § 1214\(a\)\(3\)\(B\)](#). Because the appellant's IRA appeal is now ripe for adjudication, remand is appropriate. *See Becker*, [107 M.S.P.R. 327](#), ¶¶ 7-8; *Brooks v. Department of Homeland Security*, [95 M.S.P.R. 464](#), ¶ 8 (2004).

ORDER

¶8 Because the appellant's IRA appeal is now ripe for adjudication, we REMAND this case to the regional office for further adjudication consistent with the Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.